No. 80-739

Supreme Court, U. S.
FILED
NOV 12 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

AAA TRUCKING CORPORATION and EUGENE BONACCI,

Petitioners,

vs.

LEROY GREEN and DIRECTOR OF THE DIVISION OF CIVIL RIGHTS,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GERALD R. STOCKMAN
STOCKMAN, MANCINO, MARINARI, SMITHSON, O'DONNELL & SYPEK
Attorneys for Respondents
2211 Whitehorse-Mercerville Road
Trenton, New Jersey 08619
(609) 890-0900

MARIA MARINARI SYPEK
On the Brief

4179 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 840-9494 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Denying the Writ 5

Weight Given to Arbitration Hearing by the New Jersey Court 8

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 8, 9

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) 8

Brown v. Board of Education, 347 U.S. 483 (1954) 7

Colorado Anti-Discrimination Commission v. Continental Airlines, Inc., 372 U.S. 714 (1963) 5, 6, 7

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).. 8

Guerra v. Manchester, 498 F. 2d 641 (5th Cir. 1974) 9

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 6, 7

Pepper v. Princeton University Board of Trustees, 77 N.J. 55 (1978) 6

Contents

Page

State v. Johnson, 42 N.J. 146 (1964) 6

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 6

Statutes Cited:

Civil Rights Act of 1964, Title VII; 42 U.S.C. §2000e 5, 7

N.J.S.A. 10:5-1 5

N.J.S.A. 10:5-12 5

United States Constitution Cited:

Fifth Amendment 5, 7

Fourteenth Amendment 7

No.

In The

Supreme Court of the United States

October Term, 1980

AAA TRUCKING CORPORATION and EUGENE C. BONACCI,

Petitioners,

vs.

LEROY GREEN and DIRECTOR OF THE DIVISION ON CIVIL RIGHTS,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Leroy Green was fired on March 16, 1973 by AAA Trucking Corporation and Eugene C. Bonacci, the executive officer and principal owner of AAA Trucking Corporation (hereinafter referred to as "AAA"). He filed a complaint with the New Jersey Department of Law & Public

Safety, Division on Civil Rights on March 19, 1973. The Director of the Division on October 15, 1974 issued a finding of probable cause that Leroy Green had been discriminated against because of race. On May 12, 1977, a verified complaint was amended to include the Director as a complainant alleging that AAA engaged in a pattern and practice of discrimination against minority group members (Appendix to Petition, A2a).

On October 10, 1975, Mr. Green retained personal counsel through Gerald R. Stockman, Esquire, of Stockman, Mancino, Marinari, Smithson O'Donnell and Sypek, for representation in the Division hearings. Contrary to inference in the petition filed on behalf of AAA (Petition, 4), Mr. Green continuously urged that this case be scheduled for hearing as he continued to suffer monetary damages as a result of the firing. Hearings were finally begun on July 26, 1977 and concluded on September 2, 1977 (A2a).

On March 6, 1978, the Hearing Officer determined that AAA and Eugene C. Bonacci discriminated against Leroy Green on March 16, 1973 when they fired him because of race. They were also found guilty of patterns and practices of discrimination against minority group members. The Director issued his findings and determination and order on July 14, 1978 awarding Green back pay at simple interest and granted him all pension rights as if he had not been terminated (A2a-3a).

The matter was argued in the Superior Court of New Jersey, Appellate Division on September 24, 1979, with a decision being rendered by the court on February 28, 1980 affirming the order of the Director of the Division in favor of Leroy Green but vacating so much of the order which sustained the Director's complaint remanding it to the Division (A15a).

A petition for certification was filed on behalf of AAA and Eugene C. Bonacci on April 16, 1980 which was denied on July 8, 1980 with the order of denial being filed July 10, 1980 (B20a).

Mr. Green worked for AAA for 15 years and served as shop steward from 1965 until termination (A5a). The termination of employment centered around an altercation between Green and another employee Holman. On March 16, 1973, Green reported to work. Green was assigned to a tractor that he was to use that day and found a large piece of paper on the steering wheel on which was written "Clean this truck, pig". Mr. Green felt deeply about the comment and resented it. Based on his experience, he knew that Holman was the jockey for the tractors on duty and went to the lunchroom to find him. There were five employees present along with Holman when Green confronted Holman. Holman denied that he wrote the note, but acknowledged that he left the note on the tractor after reading it. There is no dispute that Green used a loud voice to display his anger and used language which one would expect of an angered and powerful truck driver to use. The disputed facts turns on whether Green physically assaulted Holman (A5a-6a). Green absolutely denies this as do four of the others that were present. The incident lasted a few minutes and Green left to go on his regular run (A6a-7a).

Green completed his run, returned to the terminal and went home. There were no further comments with anyone, including Mr. Bonacci or any other supervisors. When he did not receive a call to report to work the next morning, he called and was advised that he had been discharged. This was done without asking for a version of the incident (A8a).

Four of the employees present at the incident testified at the hearing that there was no striking of Holman by Green. One employee had signed a statement stating that there was a

touching, but he did not testify at the trial, there being a stipulation in the hearing that he had a special relationship to the petitioner AAA, which was not disclosed (A8a).

These four witnesses testified that Mr. Bonacci questioned all of them together along with the individual who claimed there to be actual contact. Bonacci dictated a statement for them to sign which the four refused as it contained language of a physical assault. Bonacci thereafter ordered the language out and all signed the statement, including the one who had claimed to have seen a physical touching. They all testified that Bonacci advised he was thinking of suspending Green (A8a).

Bonacci testified that he had been contacted by Holman, who claimed he was verbally assaulted and grabbed on the left shoulder. He contacted another employee, who was present for part of the affair, but took no statements from any supervisors. Immediately after obtaining these statements, Bonacci contacted a labor consultant, who recommended discharge as it was a disciplinary charge under the collective bargaining agreement. Bonacci immediately on the same date, sent a letter of discharge to Green and to the union stating that the company would not tolerate physical assault under any circumstances (A9a).

Mr. Bonacci denied having any knowledge of any fights involving physical force in the company's history (A9a). There were, in fact, several other incidents of physical force which in no way broached the extreme action of discharge, as was the case here. A white truck driver testified at the hearing that in 1970, he and another white employee were in a fight in the parking lot near the Linden terminal. The other employee put a knife to his throat in retaliation for which the employee testifying stated he hit him with his belt. This altercation involved an arrest by the police and a civil action due to injuries sustained. AAA took no disciplinary action (A10a).

A second incident involved a white man who testified that he worked for AAA for 12 years. He and Sam Bonacci, Jr., a member of management had an altercation where Mr. Bonacci grabbed him and the employee hit Bonacci with sufficient force to knock his glasses off and break them. The next day he met with Mr. Bonacci and Mr. Bonacci's father. AAA took no disciplinary action (A10a).

Green had also filed a grievance which precipitated a meeting two weeks after the incident. Bonacci offered reinstatement based on a two week suspension and loss of pay, which would go on Green's record. Green refused because it would have been an admission of guilt and he feared future reprisals.

REASONS FOR DENYING THE WRIT

The New Jersey state court in finding the petitioner in violation of the law against discrimination, N.J.S.A. 10:5-1; 10:5-12 (C1a) applied the appropriate tests as set out by the United States Supreme Court and is in full keeping with the decisional law of the State of New Jersey, and in no way, conflicts with the decisional precedents of this Court under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, *et seq.*). The petitioner finds the application of the decisional law of the State of New Jersey to be in conflict with the application of the federal law such that owners of businesses dealing in interstate commerce are overly burdened and harassed by the conflicting decisions dealing with the right to discharge or discipline employees thereby hampering the interstate trucking business.

AAA has not been denied its Fifth Amendment right of due process by the decision of the New Jersey courts. Dispositive of this claim is the finding in the *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714 (1963). The New Jersey court closely reviewed the facts and found this

case to be a case of disparate treatment and adopted the guidelines of *Pepper v. Princeton University Board of Trustees,* 77 N.J. 55 (1978). The Supreme Court of New Jersey used the tests espoused in the decisional law evolved under Title VII of the Civil Rights Act of 1964, *citing Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 265-266. Further, the proper tests in establishing a *prima facie* case of discrimination was deemed to be that of *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973). The New Jersey court found disparate treatment based on Bonacci's behavior surrounding the discharge and his attempts to establish a reason for the discharge. Bonacci's actions were found to be intentional and fully supported by the record.

This finding was based on an application of *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 336 (1977) noting that proof of discrimination can be inferred from the mere fact of differences in treatment. *See also, State v. Johnson,* 42 N.J. 146, 162 (1964).

This Court rejected the claim of the application of anti-discrimination cases being an undue burden on commerce in *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.,* 372 U.S. 714 (1963). In *Colorado, supra,* a black man applied for a job as a pilot and was rejected based on race. The Court found that:

> "We are not convinced that commerce will be unduly burdened if Continental is required by Colorado to refrain from racial discrimination and its hiring of pilots in that State. Not only is the hiring within a State of an employee, even for an interstate job, a much more localized matter than the transporting of passengers from state to

> state, but more significantly, the threat of diverse and conflicting regulation of hiring practices is virtually nonexistent." *Id.* at 721.

Similarly, any argument that commerce is unduly burdened if AAA is required by New Jersey to refrain from discharging its employees because of race, is ludicrous under the present state of the law, being invalid under a stream of United States court cases, starting with *Brown v. Board of Education,* 347 U.S. 483 (1954) and, most particularly, invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The petitioner claims that the decision in the case *sub judice* imposes "onerous, harassing and conflicting conditions on" an interstate motor carrier and "stands as an obstacle to the full effectiveness" of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* (P6). The petitioner offers no explanation of this claim, but asserts that the New Jersey courts have constructed its Anti-Discrimination Act as meaning that a member of a minority class must always be hired and must never be fired. The petitioner can recite no case in New Jersey which holds such a proposition and is further incorrect in its statement that the New Jersey court found itself not bound by the standards of the United States Supreme Court when, in fact, the Appellate Division here applied the theories of *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 336 (1977).

The petitioner states that the New Jersey court did not adopt the test of *International Brotherhood of Teamsters v. United States, supra,* which held that where discrimination is alleged, the complainant "had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure — the regular rather than the

usual practice." (P7). The petitioner fails to point out that this was a patterns and practice case, and not an individual claiming a hiring or firing situation based on racial motivations.

The New Jersey courts have, in no way, deviated from the standard tests espoused in the leading United States Supreme Court cases in the area of employment discrimination. *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978); *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1978). The New Jersey court found a case of disparate treatment, such discrimination being inferred from all the facts and circumstances surrounding the handling of the case by Bonacci and the handling of other incidents much more serious than that of Green's. There was no mishandling of the burden of proof which was met by Mr. Green establishing a *prima facie* case against the AAA Trucking Company and Eugene C. Bonacci.

WEIGHT GIVEN TO ARBITRATION HEARING BY THE NEW JERSEY COURT

The New Jersey court found that the hearing officer below had considered the arbitration award and found that he was not bound by it under *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974). In that case, the Court in a footnote dealt with the factors that may be relevant to a tryer of fact:

> "We adopt no standards as to the weight to be accorded in arbitral decisions, since this must be determined in the Court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the Collective Bargaining Agreement that conforms substantially with Title VII the degree of procedural fairness in the

> arbitral form, adequacy of the record with respect to the issue of discrimination, and the special competence of the particular arbitrators.
>
> Where an arbitral determination gives full consideration to an employee's Title VII right, a Court may properly accord it great weight. This is specifically true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. The Court should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of Courts to assure the full availability of this forum." *Id.* at 60, footnote 21.

The arbitration hearing was held on July 6, 1973 with no transcription being made. It was clear throughout the record that racial discrimination was not an issue or part of the hearing. The attorney retained under the union contract to represent Mr. Green could provide no notes of the proceedings. The evidence used in the proceeding was relevant to a proof of an assault and contained no factors whatsoever dealing with a racial discrimination charge. The procedural fairness of the arbitral hearing cannot be assessed since there is no record of the proceeding. Therefore, the hearing officer was correct in exercising his discretion to give no weight to the arbitration ruling. *See also, Guerra v. Manchester,* 498 F. 2d 641 (5th Cir. 1974).

The respondent Green cannot make any comment on question #1 as presented in petitioners' moving papers (Pi), as the question as posed is unintelligible.

It is, therefore, respectfully submitted that this case in no way presents a matter appropriate to grant the petition for a writ of certiorari. There has been no conflict shown between the New Jersey state court decision and that of the United States Supreme Court and certainly no issues have been outlined in the petition to support an allegation that this is a matter of first impression.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ Gerald R. Stockman

STOCKMAN, MANCINO,
MARINARI, SMITHSON,
O'DONNELL & SYPEK
Attorneys for Respondents

MARIA MARINARI SYPEK
On the Brief